

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

NOLAN E. KLEIN,	)	
	)	
Petitioner,	)	<b>3:04-CV-0049-ECR-RAM</b>
	)	
vs.	)	
	)	ORDER
JACKIE CRAWFORD, <i>et al.</i> ,	)	
	)	
Respondents.	)	
	)	

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This matter comes before the Court on respondents' second Motion to Dismiss the petition (#19). Klein has opposed the motion (#21) and respondents have replied (#26).

The procedural history of this matter was set out in the Court's Order of December 10, 2004 (#14), and need not be repeated here. Also, in that previous order, respondents were directed to answer the petition and to produce a complete record concerning all the parole decisions - grants and denials, made since Klein was convicted in 1989. Rather than do as directed, respondents sought two extensions of time to file their "answer or motion to dismiss" to the petition. See Motions (## 15 and 17). While the Court granted the additional time, the Court's minutes specifically directed that respondents respond to the habeas petition in this case **"as ordered**

1 **in the Court's order entered December 10, 2004."** Respondents did not  
2 file an answer, nor did they provide the requisite records.

3 The second Motion to Dismiss shall be denied.

4 Klein raises a claim that his due process rights, as  
5 guaranteed by the Fourteenth Amendment to the United States  
6 Constitution have been violated with respect to the manner in which  
7 his sentence and parole eligibility have been handled (#1).  
8 Respondents move to dismiss the petition, claiming lack of exhaustion,  
9 mootness, and failure to raise a cognizable claim.

10 Exhaustion

11 Petitioner's claim is exhausted. The arguments presented  
12 by respondents, asserting that specific facts presented here have not  
13 been properly federalized, asserting that the federal petition's  
14 claims are not exhausted because they cover a different temporal  
15 aspect due to Klein's use of the phrase, "as of the date of this  
16 petition," and asserting the claim will be further unexhausted once  
17 the record of Klein's parole decisions are presented are all  
18 unpersuasive and, in fact, border on frivolousness.

19 The exhaustion doctrine requires a state prisoner to "fairly  
20 present[ ]" his or her claims to the state courts before a federal  
21 court will examine them. *Picard v. Connor*, 404 U.S. 270, 275 (1971);  
22 see also *Nichols v. Sullivan*, 867 F.2d 1250, 1252 (10th Cir.1989)  
23 (discussing fair presentation requirement). "Fair presentation" of  
24 a prisoner's claim to the state courts means that the substance of the  
25 claim must be raised there. The prisoner's allegations and supporting  
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1 evidence must offer the state courts "a 'fair opportunity' to apply  
2 controlling legal principles to the facts bearing upon his  
3 constitutional claim." *Anderson v. Harless*, 459 U.S. 4, 6 (1982)  
4 (citing *Picard*, 404 U.S. at 276-77). Only new facts or evidence that  
5 places the claims in a significantly different legal posture must  
6 first be presented to the state courts. *Vasquez v. Hillery*, 474 U.S.  
7 254, 260 (1986); *Hudson v. Rushen*, 686 F.2d 826, 830 (9th Cir.1982),  
8 cert. denied, 461 U.S. 916 (1983).

9         As petitioner demonstrates, the petition in state court  
10 raised a single claim and presented numerous facts to support that  
11 claim. Both the state and federal actions present reference to NRS  
12 213.142. Cf. Petition (#1), p. 3a, ¶ with Exhibit 1, p. 6, in support  
13 of Motion to Dismiss (#11). Also, as petitioner demonstrates, the  
14 time frames covered "as of the date of the petition" overlaps from  
15 state to federal petition. Moreover, this argument is so attenuated  
16 as to pain the Court. Petitioner argues that he has been denied the  
17 requisite parole hearings **and** that the parole board has considered him  
18 to be serving the wrong sentence during the last four hearings he has  
19 received. Because the basic facts were presented to both the state  
20 and federal courts, an passage of time between the dates the petitions  
21 were signed does not change the legal posture of the claim presented  
22 to the state courts, even if Klein has been before the parole board  
23 since he filed his state petition. *Vasquez*, 474 U.S. at 260.

24         Furthermore, fair presentment requires only that the  
25 petitioner provide the state court's with an opportunity to review and  
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1 decide his claims. *Anderson*, 459 U.S. at 6. It does not require that  
2 the state court's take that opportunity. *Smith v. Digmon*, 434 U.S.  
3 332, 333-334, 98 S.Ct. 257, 258 (1978); *Middleton v. Cupp*, 768 F.2d  
4 1083, 1086 (9th Cir. 1985); accord *Carter v. Estelle*, 677 F.2d 427  
5 (5th Cir. 1982) and *United States ex rel. Giesler v. Walters*, 510 F.2d  
6 887, 892 (3d Cir. 1975). Klein presented and the Nevada Supreme Court  
7 "considered" a proper person Motion for Leave to Proceed in Proper  
8 Person outlining his claims. See Exhibit 10 to first Motion to  
9 Dismiss (#11); Exhibit A to Opposition to Motion to Dismiss (#12).  
10 Thus, the claim that the parole board and prison officials are  
11 reviewing the wrong sentence has been fairly presented to the state's  
12 highest court.

13           The respondents' final argument against exhaustion -  
14 predicting yet a third motion to dismiss - that presentment of the  
15 record of Klein's parole board hearings would further contribute to  
16 the claim's lack of exhaustion, is also without basis in fact or law.  
17 The Rules Governing 2254 Actions require that respondents provide the  
18 record of the proceedings below as directed by the Court. Rule 5; see  
19 also Rule 7 of the Rules Governing Section 2254 Actions. Moreover,  
20 petitioner advises that these decisions were referenced in the  
21 petition and are a part of the record presented to the state courts,  
22 at least as much as could be provided by petitioner.

23           Overall, the respondents' argument regarding exhaustion  
24 evidence an obstreperous attitude which does not serve this Court or  
25 the interests of the parties.

1           The Court finds the claim to be exhausted and will not  
2 entertain further argument on the point.

3  
4           Mootness

5           Respondents next argue that the action is moot because  
6 petitioner was taken before the parole board in September, 2004,  
7 thereby giving petitioner the relief he sought.

8           Petitioner counters that the September 2004 hearing did not  
9 address his claim fully because the parole board incorrectly  
10 considered his parole from the wrong sentence. Klein's exhibits  
11 appear to support this contention. However, the Court cannot say for  
12 certain, as respondents have failed to provide the records it was  
13 ordered to provide.

14           Article 3 § 2 of the United States Constitution requires  
15 that a case or controversy between parties exist in order to allow the  
16 Court jurisdiction. This means that, throughout the litigation, the  
17 plaintiff "must have suffered, or be threatened with, an actual injury  
18 traceable to the defendant and likely to be redressed by a favorable  
19 judicial decision." *Lewis v. Continental Bank Corp.*, 494 U.S. 472,  
20 477 (1990). If the case or controversy dissolves, so that the Court  
21 can no longer afford redress for an existing injury, the matter  
22 becomes moot.

23           Thus, if the parole board provided a hearing, yet failed to  
24 consider the proper sentence, then the action is not moot. Klein  
25 specifically advised the Nevada Supreme Court that one of his issues  
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1 on appeal was

2 Whether the district court erred when it found  
3 that Klein was not entitled to relief based on an  
4 affidavit of Respondent indicating that according  
5 to their records Klein is on a different sentence  
6 than complained in his petition, when attached to  
Klein's petition he provided all his parole orders  
which indicated that the Respondents [sic] records  
are incorrect.

7 Exhibit A, p. 2, to Opposition to [first] Motion to Dismiss.

8 Since this claim was not resolved by providing Klein with  
9 a parol hearing, the matter is not moot.

10 Cognizable Claim

11 Klein contends that Nevada law provides him with a due  
12 process right to timely and regular parole hearings and to actual  
13 parole once it has been granted and ordered.

14 A threshold requirement to petitioner's substantive or  
15 procedural due process claim is a showing of a liberty interest,  
16 protected by the Constitution, in being paroled. *Greenholtz v.*  
17 *Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 7  
18 (1979). There is no constitutional or inherent right of a convicted  
19 person to be released before the expiration of a valid sentence. *Id.*

20 The Ninth Circuit Court of Appeals endorses a restrictive  
21 view of *Greenholtz* and has held that a state's statutory scheme  
22 creates a liberty interest in the granting of parole only where such  
23 scheme *mandates* release unless certain clearly-defined exceptions are  
24 found to apply. *Baumann v. Arizona Dep't of Corrections*, 754 F.2d  
25 841, 844 (9<sup>th</sup> Cir. 1985). State guidelines that merely place  
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1 parameters on the exercise of discretion in making release decisions  
2 do not create a protected liberty interest. *Id.* Viewed in light of  
3 these standards, the Nevada parole statutes do not create a liberty  
4 interest in parole that is subject to constitutional due process  
5 protection. However, once parole has been granted, such grant is a  
6 liberty interest protected by the Constitution. *Greenholtz*, 442 U.S.  
7 at 9.

8 Klein has presented documents that suggest that he is  
9 actually serving a different and consecutive sentence to the one the  
10 parole board most recently considered. Respondents shall be given a  
11 single opportunity to provide the complete record of petitioner's  
12 parole board hearings and decisions, and to make such arguments as  
13 they have to show that Klein's assertions are false.

14 **IT IS THEREFORE ORDERED** that the second Motion to Dismiss  
15 (#19) is **DENIED**.

16 **IT IS FURTHER ORDERED** that respondents shall have forty-five  
17 days to file and serve their answer to the petition in this action,  
18 including the record previously ordered produced. No other response  
19 shall be acceptable.

20 **IT IS FURTHER ORDERED** that petitioner shall have thirty (30)  
21 days to file and serve a reply to the answer.

22 Dated, this 17th day of January, 2006.

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26 UNITED STATES DISTRICT JUDGE